

STATE OF MICHIGAN
COURT OF APPEALS

GLEESON CUSTOM BUILDERS, L.L.C.,

Plaintiff/Counterdefendant-
Appellee,

v

JEFFREY T. BUDDAY and AMY C. BUDDAY,

Defendants/Cross-
Defendants/Counterplaintiffs/Third-
Party Plaintiffs-Appellants,

and

N.A. MANS & SONS, INC.,

Defendant/Counterplaintiff/Cross-
Plaintiff/Third-Party Plaintiff,

and

NORTHWESTERN FINANCIAL
CORPORATION and MANUFACTURER'S
FINANCIAL CORPORATION,

Defendants/Cross-Defendants,

and

CHARLES GLEESON, RICHARD STEVENS and
HOMEOWNER CONSTRUCTION LIEN
RECOVERY FUND,

Third-Party Defendants.

UNPUBLISHED

October 14, 2010

No. 293328

Oakland Circuit Court

LC No. 2008-089711-CH

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

In this contract dispute, appellants Jeffrey T. Budday and Amy C. Budday (appellants) appeal by right a judgment entered in favor of appellee Gleeson Custom Builders, L.L.C. (appellee) following a bench trial. We affirm.

This matter arises from a renovation project at appellants' residence. In their counterclaims, appellants asserted that appellee had abandoned the project, which was to include construction of a spec house on the vacant lot adjacent to appellants' residence. On appeal, appellants argue that the trial court erred by finding against them on their counterclaims against appellee.

Appellants first argue that the trial court clearly erred in its findings on their breach of contract counterclaim. Appellants contend that the evidence established that appellee had an agreement with them for the development of the vacant lot and the construction of the spec house. We disagree.

We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding of fact is clearly erroneous if we are "left with a definite and firm conviction that a mistake has been made." *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005).

The essential elements of a valid contract are "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005), quoting *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). In order for a contract to be completed, there must be an offer and acceptance. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Without an unambiguous acceptance in strict conformance with the offer, no contract is formed. *Id.* A contract requires mutual assent or a meeting of the minds on all the essential terms. *Id.* at 453.

The trial court found no valid breach of contract counterclaim against appellee because Jeffrey Budday admitted that there was not an executed agreement in which appellee had agreed to construct a spec house. The trial court further found that no other evidence established the existence of an agreement for appellee to construct the spec house. Indeed, Jeffrey admitted that the plan to build a spec house depended entirely on obtaining financing and that he had not obtained financing. Nor did appellants submit any documents showing that they could have obtained the financing necessary to develop the vacant lot. As a result, the trial court found that appellants' breach of contract counterclaim was not supported by the facts and evidence presented at trial.

The trial court's finding that there was no agreement between appellants and appellee to construct a spec house on the vacant lot is supported by the evidence in the record. Although there may have been discussions regarding construction of a home on the vacant lot, there is no

evidence that the parties actually executed a contract to this effect. Further, as the trial court correctly found, Jeffrey admitted that the plan was contingent on obtaining financing, no financing was ever obtained, and there was no evidence that appellants could have obtained the necessary financing. In addition, Jeffrey acknowledged at trial that appellee was not involved in the planning or design of the spec house, and the limited liability company that Jeffrey intended to form for purposes of the spec house project was never actually organized. In short, the record establishes that the parties did not enter into a contract for the construction of a spec house on appellants' vacant lot. The trial court did not clearly err by finding that appellants and appellee did not have a contract for the construction of a house on the vacant lot.

Appellants also argue that the trial court clearly erred by finding that appellee did not engage in any fraud or misrepresentation. Appellants contend that the evidence showed that appellee, through its owner Charles Gleeson, made promises and representations regarding completion of the project that it did not intend to keep. We disagree.

As this Court has stated:

To prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Roberts v Safell*, 280 Mich App 397, 403; 760 NW2d 715 (2008), *aff'd* 483 Mich 1089 (2009).]

“A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation.” *Id.* at 404, quoting *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998). “It is unnecessary to prove that the party making the representation had knowledge that it was false . . . [b]ut for liability under a theory of innocent misrepresentation to arise there must be privity of contract between the party making the representation and the party claiming to have detrimentally relied on it.” *Roberts*, 280 Mich App at 404 (citation omitted).

With regard to appellants' fraud and misrepresentation counterclaim, the trial court observed that this claim pertained to a \$15,000 payment made to appellee for the renovation portion of the project, as part of appellants' request that several additional items be completed. The trial court found that appellee credited appellants for this payment on the outstanding balance of the renovation work already performed, and that this payment did not create a new contract to construct a spec home. The trial court noted that Gleeson testified that appellee had performed the additional renovation items as best it could. The trial court concluded that there was no evidence to show that appellee committed fraud in the execution of the demolition or renovation phases of the project, and that there was no evidence that Gleeson had committed fraud.

The record fully supports the trial court's finding that there was no evidence of fraud or misrepresentation. Although appellants do not make this clear in their brief on appeal, the trial court properly noted that appellants' argument concerning fraud and misrepresentation related to

their payment of \$15,000 to appellee for the completion of certain additional items on the renovation portion of the project. However, appellee could not complete the necessary additional items because appellants did not provide all of the promised materials and supplies. Significantly, the trial court credited Gleeson's testimony that appellee completed as much work as it could with respect to the requested additional items. Further, apart from Jeffrey's unsubstantiated allegations, there was no evidence to suggest that appellee induced the payment of \$15,000 by misrepresenting that it would agree to build the spec house. The evidence does not establish that appellee, through Gleeson, made any fraudulent or false representations. Therefore, the trial court did not clearly err by finding that appellants had failed to prove fraud or misrepresentation.

Affirmed. As the prevailing party, appellee may tax costs pursuant to MCR 7.219.

/s/ Karen M. Fort Hood

/s/ Kathleen Jansen

/s/ William C. Whitbeck